DOCKET FILE COPY ORIGINAL

RECEIVED

JUL - 9 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	IB Docket No. 97-142
Rules and Policies on Foreign Participation	)	
in the U.S. Telecommunications Market	)	

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc., for itself and on behalf of its subsidiaries Southwestern Bell Communications Services, Inc., Pacific Bell Communications, Southwestern Bell Mobile Systems, Inc., and Southwestern Bell Wireless, Inc. (collectively, "SBC") herein comments on selected portions of the Commission's Notice of Proposed Rulemaking for the above-captioned proceeding. SBC requests that the Commission clarify that its proposal regarding the "no special concessions" requirement is not intended to rescind the safeguards in its recent Flexibility Order.[1] In addition, SBC urges the Commission to conclude that other countries will not necessarily adhere, and need not adhere, to rules identical to those adopted in the U. S. in their respective implementations of the WTO Basic Telecommunications Agreement and Reference Paper on Pro-Competitive Regulatory Principles.

SBC encourages the Commission not to find that Section 222 of the Communications Act applies to the Customer Proprietary Network Information derived from foreign networks. Application of Section 222 to such information would inappropriately intrude on the sovereignty

[1] Regulation of International Accounting Rates, Docket No. CC 90-337, *Phase II, Fourth Report and Order*, FCC 96-459 (Dec. 3, 1996), *recon. pending*.

No. of Copies rec'd 0+4
List A B C D E

of foreign countries and would be difficult to enforce, at best. Finally, SBC implores the Commission to compare its proposals regarding streamlined entry procedures for foreign carriers and their affiliates into the U. S. markets, on the one hand, with the complicated, time-consuming, and uncertain procedures applied to the efforts of six prominent domestic telecommunications companies, including SBC, to enter the domestic and international interLATA markets, on the other.

1. "No Special Concessions" Requirement

The Commission should clarify that this proceeding will not affect the safeguard provisions of its Flexibility Order. The Commission's intent seems to be to replace the application of the ECO test with WTO membership as the threshold consideration, rather than to nullify the other provisions in the Flexibility Order.[2] However, some of the NPRM's language is ambiguous. For example, in paragraph 115, the NPRM states: "We therefore propose to modify our no special concessions prohibition to apply only to concessions granted by foreign carriers with market power in the provision of services or facilities necessary for the provision of international services, including inter-city or local access facilities on the foreign end." This language, if read in isolation, could be construed to void the safeguards in the Flexibility Order.

The Commission's Flexibility Order defines the framework for exceptions to the no special concessions rule. A fundamental aspect of that framework is that carriers may negotiate concessions in countries that satisfy the ECO test. However, there are procedures and safeguards built into the Flexibility Order. For example, copies of alternative settlement arrangements that

[2] See NPRM, footnote 139, p.59. After describing the safeguards in the Flexibility Order, the Commission states: "We do not propose here to change these safeguards."

affect more than twenty-five percent of the inbound or outbound traffic on a particular route must be filed with the Commission and made public and must not contain unreasonably discriminatory terms and conditions.[3] The Commission imposed that requirement because of its concern that allowing carriers with a significant share of the market to negotiate alternative arrangements may have unanticipated anticompetitive effects—e.g., a U.S. carrier with a significant share of the market may be in a position to extract anticompetitive special concessions from foreign carriers to the detriment of other U. S. carriers.

Moreover, the Commission did not in its Flexibility Order grant blanket approval of concession arrangements in countries that satisfy the ECO test. Instead, it established an expedited process which required that U. S. carriers file an application to obtain approval for each alternative arrangement.[4] In the instant NPRM, the Commission describes the procedure set forth in the Flexibility Order and states: "We propose minor changes to these procedures to conform to the proposals made here. Specifically, we propose that where a U. S. carrier seeks approval to enter an alternative arrangement with a carrier in a WTO Member country, the requesting carrier be required to show only that the carrier is operating in a WTO Member country." [5] (emphasis added).

The Commission's reference to "minor" changes to its Flexibility Order procedures supports the notion that the Commission proposes only to replace the application of the ECO test with WTO membership as a threshold for permitting flexibility, rather than to negate the other provisions in its Flexibility Order. In addition, there is no need for an application process if the

[3] Flexibility Order, para. 45.
[4] Id. at paras. 57 et seq.
[5] NPRM, para. 152.

sole issue for consideration is that the concession arrangement in question is in a country that is a WTO member country. A mere notice would suffice if that were the case.

Most importantly, however, the Commission does not in this NPRM discuss or request comment on the concerns and rationale described in the Flexibility Order for safeguards such as those imposed for special concessions in arrangements affecting more than twenty-five percent of the traffic on a particular route. There is no suggestion that the Commission is no longer concerned that a U. S. carrier with a significant share of the market may extract anticompetitive special concessions from foreign carriers to the detriment of other U. S. carriers. This concern cannot be allayed by a finding that the special concession is in a country that is a WTO member country, because the pertinent issue is the market power of the U. S. carrier. The fact that the Commission does not address or request comment on its concerns underlying the procedures and safeguards set forth in its Flexibility Order also supports the notion that the Commission did not intend in the NPRM to propose nullifying those other requirements.

2. The Commission's Assumption of Equivalency of WTO Reference Paper and U. S. Regulation

The Commission has stated its belief that the principles embodied in the Reference Paper on Pro-Competitive Regulatory Principles, negotiated in concert with the WTO negotiations on basic telecommunications, are essentially the same as the requirements of the Communications Act and the Telecommunications Act of 1996. The Commission concludes that if a foreign government fails to comply with these regulatory principles, the U. S. government may enforce the commitment to adopt these principles against the foreign government.[6]

[6] Id. at para. 24.

It seems clear that the requirements of the Communications Act and the Telecommunications Act of 1996 satisfy the U. S. commitment pursuant to the Reference Paper. However, it is not so obvious that the Reference Paper compels a regulatory regime identical to that adopted in the U. S. The Reference Paper is written in very general terms and is subject to varying interpretations and implementation mechanisms.

Moreover, not all of the rules in the Telecommunications Act of 1996 and rules promulgated by the Commission pursuant to the Act would be appropriate in all of the signatory countries. Some or many of those rules may be inapposite in the existing regulatory or competitive settings of other countries. Many other countries are at different stages of development of their communications networks than is the U. S. Thus, it may be in the public interest of another country to adopt rules that are different from those adopted in the U. S. but still compliant with its commitment under the Basic Telecommunications Agreement and the Reference Paper. Therefore, the Commission should focus on whether or not other countries adhere to the principles of the Reference Paper, rather than on whether they adopt rules that are identical to those adopted in the U. S.

3. Customer Proprietary Network Information

The definition of Customer Proprietary Network Information ("CPNI") as set forth in Section 222(f) certainly does include information derived from operation or use of domestic networks. The definition, however, should not be read to include information derived from the operation or use of foreign networks ("foreign customer information"). Such a reading would be overly broad. An attempt by the U. S. to dictate how foreign carriers use foreign customer information would unreasonably intrude on foreign sovereignty and would probably be

unenforceable. Such a broad reading would ignore the different relationships foreign customers have with their carriers and cultural differences that exist worldwide.

On its face, enforcing U.S. CPNI rules would be difficult, as foreign carriers are unlikely to accept any U.S. determination of non-compliance, even as a condition of lessened regulatory treatment. Assuming foreign customer complaints reached U.S. regulators, determining the validity of the complaints would be difficult without the cooperation of the foreign sovereign. Even if the Commission were to show great deference to foreign determinations of compliance with CPNI principles, an attempted U.S. dictation of rules on how carriers use foreign customer information would raise numerous foreign relations problems that may need comment from the Department of State.

The existence of different types of foreign carriers also raises questions as to the effectiveness of applying U.S. principles to foreign carriers' relations with their foreign customers. For instance, carriers that are government-owned may use the same information to provide mail service, which appears to be contrary to what would be permitted under Section 222. Privately-owned carriers may also provide entertainment and information services, which would also raise Section 222 concerns. Cultural differences which form the basis for foreign customers' privacy expectations also may make Section 222 principles incompatible with foreign practices.

For all of these reasons, the application of Section 222 to foreign customer information would be ill-advised and should not be part of any Commission effort to regulate foreign carriers or their U.S. affiliates.

4. Streamlined Entry Procedures

The Commission has proposed streamlining the Section 214 procedures for foreign carriers and their U. S. affiliates.[7] It has proposed streamlining those procedures even for carriers from countries that did not sign the Reference Paper. Many foreign carriers are very large and well financed. The Commission proposes to streamline the Section 214 application process based only on a certification from the carrier that it will comply with the proposed regulations.[8]

SBC is certainly in favor of streamlining regulation where appropriate and so does not oppose the streamlining of regulations proposed here. However, it is ironic that the Commission is proposing streamlining to permit rapid entry to the U. S. market for affiliates of foreign carriers, while at the same time the Bell operating companies ("BOCs") are required to meet much more detailed procedures and stringent tests to enter the same U. S. market. In effect, this will tilt the playing field, because many large and well financed foreign carriers will be given a "headstart" over the BOCs in entering the long distance markets.

This tilted playing field certainly satisfies the GATS [9] National Treatment obligation, in that foreign companies will be treated more favorably than are six major domestic telecommunications companies. However, the irony in this situation underscores the important U. S. public interest in the reasonable application of the requirements in the 1996 Telecommunications Act for entry by the BOCs. Participation in the long distance arena by these domestic companies will increase competition in both the international and domestic markets and will enhance the U. S. competitive position in those markets.

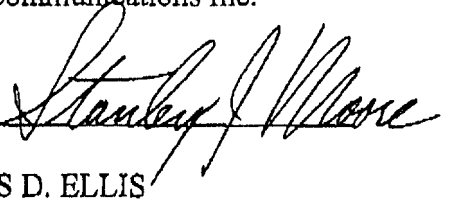
---

[7] Id. at paras. 130 et seq.
[8] Id. at para. 135.
[9] General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994).

Conclusion

For the reasons described above, SBC requests that the Commission clarify that its proposal regarding the no special concessions requirement is not intended to negate the safeguards in its recent Flexibility Order; that the Commission not conclude that other countries will or should adhere to regulatory rules within those countries that are identical to those adopted in this country; and that it not conclude that Section 222 of the Communications Act applies to CPNI derived from foreign networks.

Respectfully submitted,
SBC Communications Inc.

By: 

JAMES D. ELLIS
ROBERT M. LYNCH
TIMOTHY P. LEAHY
175 E. Houston, Room 1254
San Antonio, TX 78205
(210) 351-3420

STANLEY J. MOORE
5850 W. Las Positas Blvd.
Pleasanton, CA 94588
(510) 468-5259

ATTORNEYS FOR SBC
COMMUNICATIONS INC.